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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL GARCIA,

Defendant and Appellant.

A156745

(San Mateo County  
Super. Ct. No.  
SC081796D)

Appellant Daniel Garcia appeals from a resentencing following a remand due to a change in the law. Because the law changed yet again after the resentencing, we remand a second time.

BACKGROUND

In 2015, appellant was convicted following a jury trial of participation in a criminal street gang (Pen. Code<sup>1</sup>, § 186.22, subd. (a)), assault with a firearm on a peace officer (§ 245, subd. (d)(1)), and unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)).<sup>2</sup> As relevant here, the jury found true an allegation that appellant personally and intentionally used a firearm in the commission of the assault on a peace officer (§ 12022.53, subd. (c)), and in

<sup>1</sup> All undesignated section references are to the Penal Code.

<sup>2</sup> The facts underlying the convictions are not relevant to this appeal.

a bifurcated proceeding the trial court found true an allegation that appellant had served a prior prison term (former § 667.5, subd. (b)). The trial court sentenced appellant to an aggregate term of 29 years in prison, including 20 years on the firearm enhancement and one year on the prior prison term enhancement.

In 2018, this court issued an opinion affirming the judgment in appellant’s case but remanding the firearm enhancement in light of a then-recent amendment to section 12022.53 granting trial courts the discretion to strike a firearm enhancement. (*People v. Apolinario* (May 22, 2018, A144920) [nonpub. opn.]; see also § 12022.53, subd. (h).) At a February 2019 resentencing hearing, the trial court declined to exercise its discretion to strike the firearm enhancement. This appeal followed.

## DISCUSSION

### I. *Firearm Enhancement*

In April 2019—after appellant’s resentencing hearing—this court issued *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), holding the amendments to section 12022.53 granting trial courts the discretion to strike an enhancement under that section also granted trial courts the discretion to impose an uncharged, lesser included enhancement.<sup>3</sup> (See *Morrison*, at p. 223 [“The court had the discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome was found to be in the interests of justice under section 1385.”]; see also *id.* at p. 221 [“ ‘Section 12022.53 sets forth the following escalating additional and

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<sup>3</sup> This issue is currently pending before our Supreme Court. (*People v. Tirado*, review granted Nov. 13, 2019, S257658.)

consecutive penalties . . . for use of a firearm in the commission of specified felonies . . . : a 10-year prison term for personal use of a firearm, even if the weapon is not operable or loaded (*id.*, subd. (b)); a 20-year term if the defendant “personally and intentionally discharges a firearm” (*id.*, subd. (c)); and a 25–year–to–life term if the intentional discharge of the firearm causes “great bodily injury” or “death, to any person other than an accomplice” (*id.*, subd. (d)).’”].)

Appellant argues his firearm enhancement should be remanded to allow the trial court to exercise its discretion to strike the 20-year section 12022.53, subdivision (c) enhancement and impose a 10-year section 12022.53, subdivision (b) enhancement. We agree.

The People first argue the claim is forfeited because appellant failed to raise it at the resentencing hearing below. We disagree. As in *Morrison*, “[a]t the time of resentencing, no published case had held an uncharged lesser firearm enhancement could be imposed in lieu of an enhancement under section 12022.53, subdivision [(c) or] (d) in connection with striking the greater enhancement.” (*Morrison, supra*, 34 Cal.App.5th at p. 224.) “ ‘ ‘ ‘[W]e have excused a failure to object where to require defense counsel to raise an objection “would place an unreasonable burden on defendants to anticipate unforeseen changes in the law . . . .” ’ ’ ’ ’ ” (*People v. Rangel* (2016) 62 Cal.4th 1192, 1215.)

The People next argue *Morrison* was wrongly decided. We disagree, for the reasons set forth in that opinion.

The People do *not* argue a remand would be futile. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 “[I]f ‘ “the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.” ’ ”].) We agree

with the implicit concession that there is no such indication in the record. (See *Morrison, supra*, 34 Cal.App.5th at p. 223 [remanding where record showed “that the court thought a firearm enhancement was appropriate, but it does not show *which* firearm enhancement it believed was best suited to this case”].)

Accordingly, we will remand to allow the trial court to exercise its discretion whether to strike the section 12022.53, subdivision (c) enhancement and impose a section 12022.53, subdivision (b) enhancement.

## II. *Prior Prison Term Enhancement*

At both the original sentencing and the resentencing, the trial court imposed a one-year prior prison term enhancement pursuant to section 667.5, subdivision (b).

“Prior to January 1, 2020, section 667.5, subdivision (b) required trial courts to impose a one-year sentence enhancement for each true finding on an allegation the defendant had served a separate prior prison term and had not remained free of custody for at least five years. (§ 667.5, subd. (b).) . . . Effective as of January 1, 2020, Senate Bill No. 136 (2019–2020 Reg. Sess.) amends section 667.5, subdivision (b) to limit its prior prison term enhancement to only prior prison terms for sexually violent offenses, as defined in Welfare and Institutions Code section 6600, subdivision (b).” (*People v. Jennings* (2019) 42 Cal.App.5th 664, 681.) “Senate Bill No. 136’s (2019–2020 Reg. Sess.) amendment to section 667.5, subdivision (b) applies retroactively to all cases not yet final as of its January 1, 2020, effective date.” (*Id.* at p. 682.)

The People concede that appellant’s prior prison term enhancement should be stricken. Accordingly, we will direct the trial court to strike the enhancement.

## DISPOSITION

The matter is remanded for the trial court to (1) exercise its discretion whether to strike the section 12022.53, subdivision (c) enhancement and impose a section 12022.53, subdivision (b) enhancement; and (2) strike the section 667.5, subdivision (b) enhancement.

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SIMONS, J.

We concur.

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JONES, P.J.

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NEEDHAM, J.

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